

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LAWRENCE PONCE DEGRACIA,

Defendant-Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CASE NO. 09-CV-2934 W
90-CR-0977 W

**ORDER DENYING PETITION
FOR WRIT OF HABEAS
CORPUS [DOC. 134] AND
CERTIFICATE OF
APPEALABILITY**

On December 23, 2009, Petitioner Lawrence Ponce DeGracia, a federal prisoner proceeding *pro se*, started this habeas corpus proceeding under 28 U.S.C. § 2255. Respondent United States of America opposes. The Court decides the matter on the papers submitted and without oral argument. See CivLR 7.1 (d.1). For the reasons stated below, the Court **DENIES** the petition [Doc. 134] and **DENIES** a certificate of appealability.

I. BACKGROUND

Petitioner has three criminal cases arising out of the Southern District of California. First, in 1990, Petitioner was charged with drug offenses in Criminal Case No. 90CR0977. (Gov. Opp'n. [Doc. 138], 2:21-22.) On March 5, 1991, Petitioner entered a Tendered Plea Agreement that deferred entry of a guilty plea on the condition

1 that he not violate any federal, state or local law. (*Resp. to Gov. Opp'n.* [Doc. 139], Ex.
 2 at 15:21-26.) The agreement also provided that if Petitioner successfully fulfilled
 3 these terms, the Government would move to vacate the plea and dismiss the
 4 superseding information. (*Id.*, 15:26-28, 16:1-4.)

5 After entering the Tendered Plea Agreement, Petitioner failed to appear at a
 6 hearing and was consequently indicted for Bail Jumping in Criminal Case No.
 7 94CR0371. (*Gov. Opp'n.*, 2:22-23.) Petitioner remained a fugitive from 1994 to 2005,
 8 and continued violating federal law. (*Id.*, 2:23-24.)

9 In 2005, Petitioner was captured and indicted on drug trafficking and money
 10 laundering charges in Criminal Case No. 05CR1638. (*Gov. Opp'n.*, 2:24-25.) On June
 11 25, 2007, Petitioner entered into a Plea Agreement, and agreed to plead guilty to one
 12 count of knowingly and intentionally conspiring with others to possess
 13 methamphetamine, a Schedule II controlled substance, with intent to distribute, in
 14 violation of 21 U.S.C. §§ 841(a)(1), 846. (*Plea Agree.* [Doc. 126], 1:24-28.) The parties
 15 also agreed that the Sentencing Guidelines should be computed to result in an adjusted
 16 offense level of 29 (*Id.*, 7:24), and that the parties would not recommend any
 17 departures, including any criminal history departures under USSG § 4A1.3 (*Id.*, 9:4-6).
 18 The parties further agreed that Petitioner should receive a mandatory minimum of 10
 19 years in prison and a term of supervised release of at least 5 years. (*Id.*, 4:2-11).

20 On October 30, 2007, Petitioner's sentencing hearing was held and he was
 21 sentenced to 136 months imprisonment followed by 5 years of supervised release.
 22 (*Judgment* [Doc. 131], 2-3.) On December 23, 2009, Petitioner commenced the present
 23 section 2255 proceedings, and Respondent filed an opposition on June 30, 2010. On
 24 August 9, 2010, Petitioner filed a response.

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26 **II. DISCUSSION**

27 Petitioner moves to vacate, set aside, or correct his sentence, alleging five grounds
 28 for relief: 1) that Petitioner was "deprived of *prima facie* Constitutional rights by the

1 unconstitutionality of U.S.C. 841 as applied to him;" 2) that the "court admitt[ed]
 2 evidence . . . which had been banned by the statute of limitations;" 3) that "the district
 3 court's failure to consider numerous errors in enhancing appellant rendered his sentence
 4 unreasonable;" 4) that because his sentence is disproportionate to the crime, it violates
 5 the Eighth Amendment; and 5) that the court "lost . . . subject matter jurisdiction of the
 6 presentencing report investigation [because it] contains constitutional errors." (Pet., 6-
 7.) Respondent contends that Petitioner's claims of error are unfounded, and that he
 8 waived his right to collaterally attack his sentence pursuant to the Plea Agreement. For
 9 the following reasons, the Court finds that Petitioner waived his right to collaterally
 10 attack his sentence and, therefore, need not evaluate Petitioner's claims.

11 Courts have repeatedly upheld the validity of appeal waivers finding that "public
 12 policy strongly supports plea agreements." United States v. Navarro-Botello, 912 F.2d
 13 318, 321 (9th Cir. 1990); see also Brady v. United States, 397 U.S. 742, 752 n. 10
 14 (1970); United States v. Wiggins, 905 F.2d 51, 53 (4th Cir. 1990). Courts will enforce
 15 a petitioner's appeal waiver if (1) the waiver is knowingly and voluntarily made; and
 16 (2) the waiver, by its terms, waives the right to appeal. United States v. Nunez, 223
 17 F.3d 956, 958 (9th Cir. 2000).

18 First, a valid waiver requires that the petitioner agreed to its terms knowingly and
 19 voluntarily. See id. A reviewing court looks to the circumstances that surround the
 20 plea agreement's signing and entry to determine whether a defendant agreed to its terms
 21 knowingly and voluntarily. See United States v. Baramdyka, 95 F.3d 840, 843 (9th Cir.
 22 2000).

23 In the present case, Petitioner responds that his appeal waiver is not effective for
 24 two reasons. Petitioner first asserts that a miscarriage of justice occurred which negates
 25 his waiver of appeal. (Resp. to Gov. Opp'n, 12.) This argument is based on Petitioner's
 26 contention that "the Government broke the spirit of the [Tendered Plea] Agreement
 27 by prosecuting him and declaring him a fugitive from justice." (*Id.*, 12.)

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1 However, the Tendered Plea Agreement required Petitioner to not violate any
 2 federal, state or local laws. Petitioner violated the agreement when he jumped bail and
 3 continued breaking the law. The Tendered Plea Agreement, therefore, is null and void,
 4 and Petitioner's claim that there has been a miscarriage of justice lacks merit.

5 Petitioner next argues that he did not knowingly and voluntarily agree to the
 6 terms of the Plea Agreement. (*Resp. to Gov. Opp'n.*, 2.) Specifically, Petitioner alleges
 7 that his regular attorney was replaced by new counsel at the last minute, and that his
 8 last minute appointed counsel did not explain the agreement to him. (*Id.*) In support
 9 of this claim, Petitioner cites the Tendered Plea Agreement.

10 Not only is the Tendered Plea Agreement null and void for the reasons discussed
 11 above, but it is also irrelevant to the current proceedings. Petitioner is attacking the
 12 sentence he received after entering into the June 25, 2007 Plea Agreement. And it is
 13 the 2007 agreement that includes the appeal waiver, not the Tendered Plea Agreement.
 14 (*See Plea Agree.*, 9:27-28, 10:1-12.) Thus, any change of counsel that might have
 15 occurred in connection with the Tendered Plea Agreement did not effect Petitioner's
 16 ability to knowingly and voluntarily agree to the terms of the 2007 Plea Agreement.

17 Moreover, a review of the docket confirms that there was no last-minute change
 18 in counsel with respect to the 2007 Plea Agreement. The docket establishes that Mr.
 19 Babcock was appointed as Petitioner's counsel two weeks after his arrest in September
 20 of 2005 (*See Minute Entries* [Doc. 92], 2), and the same Mr. Babcock signed Petitioner's
 21 Plea Agreement two years later (*See Plea Agree.*, 12:7-11). Mr. Babcock also
 22 represented Petitioner at his sentencing hearing a few months later. (*See Minute Entries*
 23 [Doc. 130].) Thus, there was no last minute change in counsel with respect to the 2007
 24 agreement.

25 Furthermore, Petitioner's claim that he did not enter the Plea Agreement
 26 knowingly and voluntarily is contradicted by his sworn representations in response to
 27 this Court's questioning at the Rule 11 colloquy. (*Colloquy* [Doc. 138-2].) When
 28 questioned as to whether he had read and understood the Plea Agreement, and whether

1 he had discussed its terms with his attorney, Petitioner responded in the affirmative.
 2 (*Id.*, 5:20-25, 6:1.) Thus, the Court concludes that Petitioner knowingly and voluntarily
 3 agreed to waive his right to appeal or collaterally attack his sentence.

4 Second, a valid waiver must also explicitly state that Petitioner is waiving his right
 5 to appeal. See Nunez, 223 F.3d at 958. A reviewing court applies contract principles,
 6 including the parole evidence rule. See United States v. Ajugwo, 82 F.3d 925, 928 (9th
 7 Cir. 1996). Under the parole evidence rule, a court enforces the contract's plain
 8 language and does not look to "extrinsic evidence. . . to interpret. . . the terms of an
 9 unambiguous written instrument." Wilson v. Arlington Co. v. Prudential Ins. Co. Of
 10 Am., 912 F.2d 366, 370 (9th Cir. 1990).

11 Here, the Plea Agreement explicitly states, in relevant part:

12 In exchange for the Government's concessions in this plea agreement,
 13 defendant waives, to the full extent of the law, any right to appeal or to
 14 collaterally attack the conviction and sentence, including any restitution
 15 order, unless the court imposes a custodial sentence greater than the high
 16 end of the guideline range (or statutory mandatory minimum term, if
 17 applicable) recommended by the Government pursuant to this plea
 18 agreement at the time of sentencing. If the custodial sentence is greater
 19 than the high end of that range, the defendant may appeal, but the
 Government will be free to support on appeal the sentence actually
 imposed. If the defendant believes the Government's recommendation is
 not in accord with this agreement, defendant will object at the time of
 sentencing; otherwise the objection will be deemed waived.

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 21 (*Plea Agree.*, 9:27-28, 10:1-12.) Thus, Petitioner agreed to waive his right to collateral
 22 attack so long as the Court did not impose a sentence longer than the high end of the
 23 offense level recommended by the Government.

24 Petitioner responds that "the sentencing judge further exceeded the maximum
 25 sentence in one of the pleas." (*Pet.*, 8.) But Petitioner pled guilty to a crime that carried
 26 a maximum penalty of life in prison. (*Plea Agree.*, 4:5.) Petitioner's sentence of 136
 27 months imprisonment followed, by 5 years of supervised release, thus did not exceed the
 28 maximum sentence. Because the sentence did not exceed the high end of the

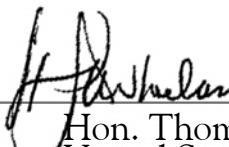
1 recommended offense level, the terms of his Plea Agreement bar this collateral attack.
2 The Court is, therefore, prevented from granting the habeas relief requested herein.
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4 **III. CONCLUSION AND ORDER**

5 In light of the foregoing, the Court **DENIES** Petitioner's petition for writ of
6 habeas corpus. [Doc. 134.] Moreover, because reasonable jurists would not find the
7 Court's assessment of the above issues debatable or wrong, the Court **DENIES** a
8 certificate of appealability. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

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10 **IT IS SO ORDERED.**

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12 DATED: January 27, 2011

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Hon. Thomas J. Whelan
United States District Judge

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